

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAUL W. ANDERSON

Claimant

VS.

LA SUPERIOR FOOD PRODUCTS, INC.

Respondent

AND

ULLICO CASUALTY COMPANY

Insurance Carrier

Docket No. 1,055,264

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 28, 2011, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Leah Brown Burkhead, of Mission, Kansas, appeared for claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for workers compensation benefits, finding that claimant failed to give respondent timely notice of his accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 27, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that he failed to give respondent timely notice of his accident. Claimant contends he provided timely notice to two separate supervisors at respondent. Accordingly, claimant asks the Board to reverse the order of the ALJ and remand the matter with directions that the ALJ order an authorized treating physician.

Respondent argues that neither of the persons claimant claims to have given notice of his accident were duly authorized agents of respondent for the purpose of receiving notice of work-related injuries. In the event the Board finds the persons were duly authorized agents of respondent, it argues that the notice given by claimant was deficient and not provided within 10 days of the date of accident. Respondent, therefore, asks that the Board affirm the ALJ's Order.

The issue for the Board's review is: Did claimant give respondent timely notice of his accident?

FINDINGS OF FACT

Claimant had worked for respondent approximately three years as a maintenance mechanic. He testified that sometime during the week prior to Halloween of 2010, he was repairing a conveyor belt and was in a sustained, awkward position, bending and twisting. In doing so, he injured his mid to low back. Claimant could not remember exactly which day during that week he was injured. At first claimant thought his symptoms would just go away, but they persisted. He particularly remembered having a stabbing pain in his back on Halloween.¹ Claimant continued to work for respondent until November 10, 2010, performing his regular job. From the time of his injury to the last day he worked for respondent, claimant's symptoms remained the same.

Claimant admitted that he did not report his accident to either of respondent's owners. During a casual conversation, claimant told Soldead Nguyen, who he identified as respondent's production supervisor, that he thought he hurt his back while working on the conveyor. Claimant also testified he spoke with Javier Chavez², who he identified as the production supervisor for the flour tortilla line. Claimant said he was working on a cooling conveyor, and he asked Mr. Chavez if he would do the work because he had hurt his back. Claimant said Mr. Chavez agreed to do the work. Claimant testified that both of these conversations were within 10 days of the date of his accident.

Claimant said if he called in sick, wanted a raise, or had issues at work, he would have spoken with the two owners, Larry O'Brien or George Young. But claimant never told either about the problem he had with his back, and to his knowledge the first Mr. O'Brien or Mr. Young knew about his injury was when his claim for compensation was filed on March 30, 2011. He said he was afraid if he reported an injury, he would be terminated.

¹ Claimant said he did not work the weekend of Halloween, so the injury had to have been the week prior. Halloween 2010 was on a Sunday.

² Claimant thought Javier's last name was Mura, but an affidavit signed by Larry O'Brien, respondent's Chief Operating Officer, identified him as Javier Chavez.

Claimant said that respondent had a protocol for reporting work-related injuries, and he admitted he did not follow that protocol. But he believed that Ms. Nguyen and Mr. Chavez, as supervisors, had an opportunity to say something. Claimant said he did not ask Ms. Nguyen or Mr. Chavez to send him to a doctor or help him fill out an injury report when he spoke with them during the 10-day reporting period. He did not ask either to report the injury to Mr. O'Brien or Mr. Young. He did not tell Mr. Chavez when the accident happened or what happened. Claimant said at some point before he retained an attorney he asked Ms. Nguyen for treatment, and her response was to "do what you've got to do."³

Claimant admitted he told Mr. O'Brien that he was going to leave respondent a week before his last day. He agreed that there would not have been any ramifications if he had reported his injury during that week. He testified, however, that he thought if he got away from the work he performed at respondent, his symptoms would go away.

Respondent entered into evidence the affidavit of Larry O'Brien wherein he stated that claimant reported only to Mr. O'Brien or Mr. Young, that Ms. Nguyen was the inventory/warehouse supervisor and had no people reporting directly to her, and Mr. Chavez was the maintenance supervisor and had no people reporting directly to him. Further, Mr. O'Brien stated that neither Ms. Nguyen, Mr. Chavez, nor any other person working at respondent, were duly authorized agents for purposes of receiving notice of a work related injury.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant

³ P.H. Trans. at 21.

shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

"Notice to an immediate supervisor constitutes notice to the employer."⁴

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

ANALYSIS

Claimant is alleging a specific accident on a single date, not a series of repetitive traumas. Although the date of accident is uncertain, it occurred sometime during the week ending October 31, 2010. The date of accident is not the issue. Claimant testified that he spoke with Ms. Nguyen and Mr. Chavez within 10 days of his alleged accident. Neither Ms. Nguyen nor Mr. Chavez testified, so claimant's testimony that he gave them notice of accident within 10 days is uncontradicted. The primary dispute is whether Ms. Nguyen and/or Mr. Chavez are representatives of the employer for purposes of satisfying the notice "to the employer" requirement of K.S.A. 44-520.

Respondent contends that only Mr. O'Brien and Mr. Young had supervisory authority over claimant. Claimant admits he did not report his accident to either Mr. O'Brien or Mr. Young within 10 days. And Mr. O'Brien denies he was told of claimant's accident by either Ms. Nguyen or Mr. Chavez. He further denies that either of these supervisors had supervisory authority over claimant and, as such, they were not claimant's supervisors.

Respondent acknowledges that Ms. Nguyen and Mr. Chavez were both supervisors but contends notice of accident to either one of them was insufficient to comply with the

⁴ *Odell v. Unified School District*, 206 Kan. 752, 755, 481 P.2d 974 (1971).

⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁶ K.S.A. 2010 Supp. 44-555c(k).

statutory requirement because neither one was claimant's supervisor. The statute does not make such a distinction.

Claimant's job title was maintenance mechanic. Mr. Chavez' job title was maintenance supervisor. It seems improbable that Mr. Chavez did not exercise some type of supervisory authority over claimant. Nevertheless, it is claimant's testimony that he only casually mentioned to Mr. Chavez that he had hurt his back. Claimant did not say how or when he hurt his back. Moreover, he did not convey that his back injury was work related. Claimant did not ask for medical treatment or for an accident report form to complete. As such, there was apparently no reason for Mr. Chavez to believe that claimant was reporting a work-related accident and that he should pass this information along to Mr. O'Brien or Mr. Young. Accordingly, claimant's conversations with Ms. Nguyen and Mr. Chavez were insufficient to satisfy the notice requirements of the statute.

CONCLUSION

Claimant failed to prove he gave respondent timely notice of accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated September 28, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge